Office-Supreme Court,
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ALEXANDER L. STEVAS,

CASE NO. 1859

in the

Supreme Court

of the

United States

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Florida

PETITIONER'S REPLY

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ARGUMENT

I

THE ISSUES ARE PROPERLY BEFORE THIS COURT

Contrary to the assertions in the briefs of respondent Ethyl Corporation and of the State of Florida as amicus curiae, the issues presented by David Balter's petition for certiorari are properly before this Court.

Two questions are presented:

1) Whether Florida's failure to provide an appeal as of right to its Supreme Court when its District Courts of Appeal adopt conflicting substantive rules of law violates the equal protection clause; and

2) Whether this Court should hold the right to a civil jury trial applicable to the states.

Both Ethyl and the State concede that the latter question was properly presented below.[1] They assert, however, that Balter did not argue or plead the equal protection clause below, and that this precludes this Court's granting the petition.

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[1]Ethyl purports to argue that while Balter timely and properly raised the Seventh Amendment in objection to the Florida Third District Court of Appeal's re-evaluation of the facts, "nowhere does the record show that the question was passed upon. . . ." The question was raised at the earliest opportunity, and was necessarily decided.

The equal protection violation resulted from the Florida Supreme Court's refusal to resolve the conflict in substantive law. The very constitutional infirmity of which Balter complains here denied him any opportunity to raise this objection below.[2] Florida's Third District chose to adopt a substantive rule of law contrary to that of Florida's Second and Fifth Districts. Balter's sole redress was to seek review (as a matter of "grace") in the Florida Supreme Court. The only issue Balter was permitted to address in the Florida Supreme Court was whether there was a conflict in precedents. The Florida Supreme Court does not hear constitutional claims, unless a district court of appeal "expressly" addresses such a question in an opinion. *Fla. Const.* art. V, §3(b)(3) (1968 Revision as amended 1980). The Florida Supreme Court's denial of Balter's petition for review was not subject to a motion for rehearing. Fla.R.App.P.9.330(d).

Balter therefore has submitted the issue at the earliest opportunity, and this Court can and should exercise jurisdiction. *See Saunders v. Shaw*, 244 U.S. 317, 320 (1917) ("But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."). *See also Herndon v. Georgia*, 295 U.S. 441

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[2]Moreover, this Court is not precluded from deciding issues not presented below. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 1471 n. 2 (1980); *Vance v. Terazas*, 444 U.S. 252, 100 S.Ct. 540, 544 n. 5 (1980).

(1935); *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932).

Ironically, the State argues that the petition should be denied on the basis of "adequate and independent state grounds." According to the State, the decision below was solely a determination of state substantive law. Balter's petition is not based on a misapplication of state law. The petition is based upon the fact, resulting from Florida's appellate structure, that there is no longer such a thing as Florida law. There is only the law of the Third District, the law of the Second District, *et cetera.*

II

FLORIDA'S FAILURE TO PROVIDE AN APPEAL AS OF RIGHT TO ITS SUPREME COURT WHEN ITS DISTRICT COURTS ADOPT CONFLICTING SUBSTANTIVE RULES OF LAW VIOLATES EQUAL PROTECTION.

The "law of Florida" no longer exists. Each district is free to develop its own substantive law, and excepting those cases which the Florida Supreme Court finds worthy of "grace," the conflicts cannot be resolved. Neither Ethyl nor the State even purports to suggest any rational basis for the resulting differences in substantive law. Ethyl responds simply that territorial distinctions are absolutely immune from equal protection analysis. And the State asserts that the system allows "litigants [to] obtain, without unreasonable delay and

expense, just judicial decisions of finality." Balter submits, for the reasons set forth in his petition, that neither argument can survive current equal protection analysis.

III

THIS COURT SHOULD HOLD THE RIGHT TO A CIVIL JURY TRIAL APPLICABLE TO THE STATES.

Ethyl and the State argue that the states are free to abolish civil jury trials. Ethyl cites the English abrogation of jury trial as authority. The State asserts that this Court cannot reconsider its decision in *Fay v. New York*, 232 U.S. 261 (1947).

The current British model has no authoritative value whatsoever. The seventh amendment affords the right to a civil jury trial *as it existed in 1791. United States v. Wonson*, 28 F.Cas. 745 (C.C.D. Mass. 1812).

This Court held in *Fay* that neither the sixth amendment nor the seventh amendment could apply to the states. *Fay* was overruled as to the Sixth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Balter submits, as set forth in his petition, that the Court should reconsider *Fay's* applicability to civil jury trials as well, in light of subsequent fourteenth amendment decisions.

CONCLUSION

For these reasons, the court should grant the petition for writ of certiorari.

Respectfully submitted,
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